

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COURTNEY IFILL,

Defendant-Appellant.

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UNPUBLISHED

March 2, 2006

No. 256752

Cass Circuit Court

LC No. 03-010300-FC

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

After a jury trial, defendant appeals by right from his convictions of attempted second-degree murder, MCL 750.317, MCL 750.91, carrying a firearm with unlawful intent, MCL 750.226, discharging a firearm at a dwelling or occupied structure, MCL 750.234b, and three counts of possessing a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent terms of 12 to 25 years' imprisonment for the attempted murder conviction, three to five years' imprisonment for the carrying a weapon with unlawful intent conviction, two to four years' imprisonment for the discharge of a firearm conviction, and a consecutive term of two years' imprisonment for the felony-firearm convictions. We vacate defendant's conviction for attempted second-degree murder and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The defendant lost several hundred dollars during a dice game in a friend's garage with the victim, Bernard Gaston. The victim recalled that around midnight, defendant, who seemed upset, left the garage briefly to retrieve more money, and that when he returned, defendant and the victim continued gambling. According to the victim, defendant continued losing money until the victim expressed his intention to stop the game. The victim averred that he turned his back to defendant to count his winnings, and that he earmarked two or three hundred dollars that he had decided to give back to defendant; but when the victim turned around, defendant, who held a pistol pointed upward in his right hand, demanded, "Give me all my money," and inquired, "Where my money at[?]"

The victim recounted that when he advised defendant that he had taken some of the money inside of his friend's house, defendant responded by firing the pistol into the air and instructing the victim to retrieve the money. According to the victim, as he reached for the door defendant pulled him back and told him not to go inside the house, and then, as the victim stepped away from the door, defendant used the pistol to strike the top of his head. The victim

described that he lunged toward defendant and wrestled with him. Defendant dropped the pistol and it fell to the floor. While prone on the ground, defendant recovered the pistol, aimed at the victim's upper body, and fired. Although the victim had suffered a gunshot wound to the chest, he did not realize it, and recommenced wrestling with defendant. The defendant called the victim a name and advised the victim that he had shot him. The victim's friend telephoned the police, and until the police arrived, the victim and defendant continued wrestling. At one point, the defendant attempted to aim the pistol at the victim again.

Defendant averred that after losing several hundred dollars to the victim, he picked up the victim's dice and noticed that they bore multiples of the same numbers. After defendant accused the victim of cheating and demanded the return of his money, the victim approached defendant and attempted to get possession of the pistol that defendant carried in his waistband. According to defendant, he and the victim struggled for possession of the pistol for about five or ten minutes, until the pistol somehow discharged. He also stated that at some point he and the victim simply laid on the garage floor, with the pistol between them. Defendant denied pointing the pistol at the victim or using it to strike the victim's head. Defendant also denied knowing that the victim had been shot during their struggle.

Defendant was charged with six counts: (1) attempted murder ; (2) carrying a pistol with unlawful intent; (3) discharging a pistol in an occupied building; and (4)-(6) felony-firearm. After the presentation of evidence at trial, the parties and the court reviewed the instructions. Defense counsel objected to the trial court's rejection of proposed lesser-included instructions regarding reckless discharge of a firearm, but otherwise approved them. Regarding attempted second-degree murder, a lesser included offense of attempted murder (first-degree), the trial court instructed the jury that the prosecutor had to prove that defendant had one of three states of mind: "He intended to kill, or, he intended to do great bodily harm to Bernard Gaston, or, he knowingly created a very high risk of death or great bodily harm knowing that the death or such harm would be the likely result of his actions."

The jury found defendant guilty of attempted second-degree murder and all the other charges. Before sentencing, defense counsel moved for acquittal of the attempted second-degree murder conviction and the related felony-firearm conviction. Defense counsel argued that while researching sentencing issues , he discovered that the trial court's attempted second-degree murder instructions were erroneous because they did not require the jury to find that defendant intended to kill the victim, as required by *People v Graham*, 219 Mich App 707, 711; 558 NW2d 2 (1996), and *People v Hall*, 174 Mich App 686, 690; 436 NW2d 446 (1989). The court denied the motion .

Defendant correctly argues that the trial court erroneously instructed the jury regarding the requisite intent element to support a charge of attempted second-degree murder. In *Hall*, this Court stated that "although a defendant may be charged with and convicted of attempted manslaughter or attempted second-degree murder, both crimes require a showing that the defendant intended to bring about a death, and may not be based on a defendant's negligent or reckless actions." *Hall, supra* at 690. In *Graham*, this Court similarly observed that "[a] conviction of attempted murder requires a showing that the defendant intended to bring about a death. Such a conviction may not be based upon a defendant's negligent or reckless actions. Thus, the instruction given by the trial court, which allowed a conviction upon negligent or reckless conduct, was error." *Graham, supra* at 711.

Like the attempted murder instructions given in *Hall* and *Graham*, the attempted second-degree murder instructions in this case explicitly provided that the jury could convict defendant on the basis of a criminal mental state less than the specific intent to bring about a death. Therefore, the instructions were erroneous.

The failure to properly instruct a jury with regard to each element of an offense is a constitutional error because the Fifth and Sixth Amendments to the United States Constitution require that criminal convictions rest upon a jury determination that the defendant is guilty of every element of the crime beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 761; 597 NW2d 130 (1999). Although a constitutional right may be forfeited by the defendant's failure to timely assert the right, appellate consideration of the issue remains available for claims of plain error that affect a defendant's substantial rights. *Id.* at 761-764. Here, the instruction was plainly erroneous under the established case law of *Hall* and *Graham*. Further, the erroneous instruction prejudiced defendant's substantial rights because it permitted the jury to convict him on evidence of less than the required criminal intent. *People v Kanar*, 314 Mich 242, 253-254; 22 NW2d 359 (1946).

Although a plain error affecting defendant's substantial rights exists in this case, the parties dispute whether this Court may consider it. Defendant acknowledges that he did not properly preserve this issue for appeal, but he argues that it can be reviewed anyway. The prosecution contends that defendant waived appellate review of this issue.

Waiver means "the intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).<sup>1</sup> Forfeiture is the "failure to make the timely assertion of a right." *Id.*<sup>2</sup> "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Id.*<sup>3</sup> "Mere forfeiture, on the other hand, does not extinguish an error." *Id.* at 216.

In this case, the record establishes that defense counsel intentionally waived any claim of instructional error. Defense counsel affirmatively expressed that, apart from the lesser included instruction requests not at issue in this case, the defense had "no other objection to either those [instructions] chosen or read." Defense counsel's affirmative expression of satisfaction thus extinguished any claim of error regarding most of the jury instructions, including those describing the required elements for attempted second-degree murder. *Carter, supra* at 215-216.

Defendant next contends that his trial counsel was ineffective for failing to object at trial to the erroneous attempted second-degree murder instructions. "To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms," and "must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have

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<sup>1</sup> Internal quotation omitted.

<sup>2</sup> Internal quotation omitted.

<sup>3</sup> Internal quotation omitted.

been different, *and* the attendant proceedings were fundamentally unfair or unreliable.” *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Given that at the time of defendant’s trial this Court had held more than once that a specific intent to kill constitutes a necessary element of the crime of attempted second-degree murder, we find that defense counsel’s failure to object to the trial court’s instructions, which erroneously omit the specific intent requirement, qualifies as objectively unreasonable. See *Adams Outdoor Advertising v City of East Lansing (After Remand)*, 463 Mich 17, 27 n 7; 614 NW2d 634 (2000) (reciting the well-established principle that people are presumed to know the law). Furthermore, because the trial court incorrectly instructed the jury regarding an element of the crime for which the jury convicted defendant; i.e., the specific intent necessary for the jury to find defendant guilty of attempted second-degree murder, the erroneous instruction plainly pertained to a basic and controlling issue in the case. Consequently, we conclude that defense counsel’s failure to object to the incorrect instruction prejudiced defendant’s right to a fair trial and reasonably affected the outcome of the trial with respect to the attempted murder charge. *People v Ortiz*, 249 Mich App 297, 311-312; 642 NW2d 417 (2002).<sup>4</sup>

We vacate defendant’s conviction for attempted second-degree murder and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper  
/s/ Kathleen Jansen  
/s/ Jane E. Markey

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<sup>4</sup> We reject the prosecutor’s suggestion that the erroneous instruction could not have prejudiced defendant because, based on the record evidence, the jury could not have reasonably considered that defendant had any mental state other than the intent to bring about a death. In light of the equivocal evidence, the erroneous instruction, and the prosecutor’s closing argument, which included the contention that the jury could convict defendant of attempted second-degree murder in the absence of an intent to bring about a death, the jury plausibly could have found that defendant knowingly created a high risk of death or great bodily harm by bringing a gun to the dice game to recover the money from the victim, without any intent to bring about the victim’s death.